IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 981 OF 2003

Smt. Rajpatibai B. Jaiswal & Anr. ..Appellants

versus

Hemchand H. Khandelwal ..Respondent

Mr. Bharat Joshi with Shri J.R. Vakil for the Appellants.

None for the Respondent .

CORAM : D. G. DESHPANDE,J.

DATE : 24TH MARCH, 2005

ORAL ORDER :

1. Heard counsel for the appellants. Nobody is present for the respondent.

2. Appellants are the original defendants. Respondent - Plaintiff filed a suit before the City Civil Court vide Suit No. 5113 of 1980. There was only one prayer for claiming main relief that was prayer (a) and it was for a permanent injunction restraining the defendants from dispossessing the plaintiff and interfering with the plaintiff's business except by due process of law. In paragraph 7 of the plaint, the plaintiff has stated that this

being a suit for injunction, the reliefs are not susceptible of any monetary valuation and the plaintiff therefore values the same at Rs.300/-.

3. Counsel for the appellants - defendants contended that after the aforesaid suit of the respondent - plaintiff, the defendants had filed a suit on the basis of the title in the High Court being Suit No. 1512 of 1981 on 27.10.1981. He further contended that even if the plaintiff-respondent had succeeded, the court could have at the most granted him relief in terms of prayer (a) of the Plaint. Counsel for the appellants states that in the suit before the High Court he has claimed that the respondent was conducting business i.e. business was of the appellants in that suit. He also contends that when the respondent in his suit before the City Civil Court had not claimed any declaration about the ownership of business and had claimed only injunction excepting by due process of law, then the court committed a mistake in deciding Issue No.3 in favour of the respondent because decision of that issue will make his suit in the High Court as infructuous.

4. I find considerable force in the submissions made by the appellants. It is true that injunction as prayed in terms of prayer (a) has been granted as

per issue No.4. But grant of the injunction cannot be an obstacle in the way of the present appellants in prosecuting their suit based on title because by filing a suit the appellants have followed due process of law. However, the declaration of ownership of business is an issue raised by the present appellants substantially in their suit before the High Court. That suit came to be filed in 1981 i.e. much before the decision of the respondent's suit and therefore the court could not have given finding on issue no.3 because that issue is raised and is pending in the suit of the appellants in the High court.

5. My attention was drawn by counsel for the appellants to the roznama of the trial court dated 20.6.1997 as per which the respondent took out a Notice of Motion No. 2178 of 1997 for deleting issue and for alteration of issue. At that time only one issue whether the respondent was entitled to permanent injunction was framed. But the Respondent wanted in view of the suit filed by the present appellants in the High Court to get the issue decided by the City Civil Court and therefore he took out this Notice of Motion for addition or alteration of issue. That was partly allowed by the court on 20.6.1997 and then issue Nos. 1 to 3 were newly added.

6. Counsel for the appellants firstly contended that Issue No.1 and 2 relate to a declaration of tenancy rights, and, secondly, the right of the present appellants as claimed in the suit before the High Court was as against the document relied upon by the respondent in the City Civil Court, Exhibit'B' (page 100) to the effect that her signature was obtained by misrepresentation. He therefore contends that in 1981 the present appellants filed a suit, of which this Exhibit 'B' was an important document and she was seeking declaration in respect of that document then the trial court erred in reframing the issue and giving a finding on this document.

7. He contended that in fact this document, Exhibit 'B' was challenged, as stated by him, earlier in the suit before the High Court. The High Court was seized of the matter since 1981 and therefore the trial court in 1997 should not have raised any issue regarding this document and should not have given any finding.

8. A perusal of Exhibit 'B' which is a photo copy of the original agreement shows that the trial court committed a grave error in giving a finding in favour of the respondent. This court sitting in

appeal can give independent finding in this regard and conclusion. However, since the suit of the appellants is pending in the High Court, it would not be proper to give any finding. But it is necessary to say in view of the observations and conclusions of the trial court that finding on Issue No. 1 to 3 should not have been given and could not have been given in favour of the respondent. In view of this matter, looking to Exhibit 'B' and the manner in which respondent got the issues altered to suit his purpose, the judgment of the trial court is perverse so far as issue Nos. 1 to 3 are concerned. The respondent at the most is entitled to injunction as prayed in plaint prayer (a) simply on the basis of his previous possession. Therefore, following order:

ORDER

. Appeal is allowed.

. Finding of the trial court on Issue Nos. 1 to 3, 5 and 6 are set aside. Respondent will be entitled to permanent injunction as prayed in prayer (a) of the plaint simply on the basis of his previous possession, nothing more nothing less. No order as to costs.

24.03.2005 (D.G. DESHPANDE, J.)